IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 523

ESTATE OF HAROLD I. PRATT, Deceased, UNITED STATES TRUST COMPANY OF NEW YORK and HARRIET BARNES PRATT, Executors,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

ROLAND L. REDMOND,
Counsel for the Petitioners.

THE COURT PRESS, N. Y. C.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

United States Trust Company of New York and Harriet Barnes Pratt, Executors of the Estate of Harold I. Pratt, deceased, pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above case on June 27, 1946, affirming a decision of The Tax Court of the United States.

Opinions Below

The majority (R. 71) and dissenting (R. 86) opinions of the Tax Court are reported in 5 T. C. 881. The *per curiam* opinion of the Circuit Court of Ap-

peals for the Second Circuit (R. 102) is reported in 155 F. (2d) ——.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 27, 1946 (R. 103). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Whether Section 811 (c) of the Internal Revenue Code, in so far as it requires that the value of the corpus of an *inter vivos* trust created January 15, 1903, be included in the gross estate of the decedent, is retroactive, void and in contravention of the Constitution of the United States where (1) the transfer in trust was not made in contemplation of death, and (2) at the time the transfer in trust was made there was no statute imposing an estate tax.

Constitutional Provisions and Statute Involved

The Fifth Amendment to the Constitution and the appropriate sections of the Internal Revenue Code are set forth in the Appendix (*infra,* pp. 11-12).

Statement of Matter Involved

This case involves a federal estate tax deficiency asserted against the estate of Harold I. Pratt, who died testate on May 21, 1939, at the age of 62 years.

The pertinent facts as stipulated before The Tax Court may be summarized as follows:

The decedent transferred certain property in trust for the benefit of himself and remaindermen by an indenture executed in the State of New York under date of January 15, 1903. Under this indenture, the trust term was measured by the lives of a nephew and niece of decedent and the survivor of them. During the trust term the income, so far as here material, was to be paid to the decedent during his life and upon his death to his issue from time to time living, in equal shares, *per stirpes.* Upon the expiration of the trust term the principal of the trust was to be transferred to the decedent if then living, or in case of his prior death to his issue then living *per stirpes,* or in default of the foregoing to the issue of decedent's father then living *per stirpes* (R. 73-74). It was stipulated that this transfer was not made in contemplation of death (R. 55). At the time of the decedent's death, one of the measuring lives had died but Mary R. B. Ladd the other measuring life, who was born on April 27, 1887, was living, and the trust had not terminated (R. 74).

The Commissioner determined that the value of the property constituting the principal of the *inter vivos* trust should be included in the gross estate of the decedent as a transfer intended to take effect in possession or enjoyment at or after his death under the provisions of Section 811(c) of the Internal Revenue Code (R. 13).

The Tax Court upheld the Commissioner's determination, with six judges dissenting on the ground that the case was indistinguishable from *Nichols* v. *Coolidge,* 274 U. S. 531 (1927) (R. 71-88).

The Circuit Court of Appeals for the Second Circuit affirmed the judgment of the Tax Court and rejected the contention of petitioners that where an *inter vivos* trust was created prior to the enactment of the federal estate tax in 1916, the inclusion of the value of the trust property in the gross estate of the decedent would violate the Fifth Amendment (R. 102).

Specifications of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In holding that the corpus of the trust created in 1903 is includible in the gross estate of the decedent under Section 811(c) of the Internal Revenue Code (R. 94).

2. In failing to hold that Section 811(c) of the Internal Revenue Code violates the Fifth Amendment to the Constitution of the United States in so far as it requires that property irrevocably transferred by the decedent before the enactment of the federal estate tax and not in contemplation of death shall be included in his gross estate (R. 95).

3. In affirming the decision of the Tax Court of the United States (R. 102).

Reasons for Granting the Writ

1. The decision of the Circuit Court of Appeals for the Second Circuit in the case at bar is in direct conflict with *Nichols* v. *Coolidge*, 274 U. S. 531 (1927).

The *Coolidge* case involved an *inter vivos* trust created in 1907 by the decedent and her husband. The

trust instrument provided that the income of the trust was to be paid in certain proportions to the two settlors during their joint lives and thereafter solely to the survivor.[1] On the death of the survivor, the trustees were directed to distribute the corpus equally among the settlors' five surviving sons and the heirs of such of them as died during the trust term, such heirs to be determined in accordance with the statute of distribution in effect at the death of the surviving settlor, provided no widow of a deceased son should take more than one-half of her husband's share.

The Commissioner included in Mrs. Coolidge's gross estate, as a transfer taking effect at or after her death, the value of the part of the corpus of the trust which she had transferred to the trustees.

The District Court found that the transfer in trust took effect in possession or enjoyment at or after the decedent's death, saying:

> "The interest of the sons, therefore, was not a contingent interest, but rather a vested interest, liable to be divested by death before the death of the survivor of the parents. They would not, however, come into the full possession and enjoyment of the trust property; they could not exercise full dominion over it, sell or otherwise dispose of it, until the termination of the trust, and by its terms the trust was not to be terminated until on or after the death of the decedent."
>
> *Coolidge* v. *Nichols,* 4 F. (2d) 112 (1925), at p. 115.

[1] In 1917 the settlors assigned to their five sons their interest in the trust fund including the right to receive income therefrom. Each son and his representatives in the case of his death was thereafter entitled to one-fifth of the income of the trust.

It also found that Section 402(c) of the Revenue Act of 1918 (the predecessor of Section 811(c) of the Internal Revenue Code) was intended to be applied to transfers whenever made, but it refused to include any part of the trust property in Mrs. Coolidge's gross estate on the ground that the statute was unconstitutional under the Fifth Amendment to the extent that it applied to transfers made before the federal estate tax was enacted.

On appeal, this Court affirmed the decision of the District Court basing its opinion squarely on the unconstitutionality of the statute. It said:

> "The statute requires the executors to pay an excise ostensibly laid upon transfer of property by death from Mrs. Coolidge to them but reckoned upon its value plus the value of other property conveyed before the enactment in entire good faith and without contemplation of death. Is the statute, thus construed, within the power of Congress?
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> * * * *
>
> "This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. (Citing cases) And we must conclude that §402(c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of the property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."
>
> *Nichols* v. *Coolidge*, 274 U. S. 531 (1927) at pp. 542-543.

Since the decision of the *Coolidge* case, this Court has not had occasion to pass upon the constitutionality of Section 811(c) or its predecessors as applied to a transfer made prior to September 8, 1916, the effective date of the federal estate tax. It has, however, on numerous occasions considered the constitutionality of retroactive taxes and has consistently cited *Nichols* v. *Coolidge, supra,* with approval[1] and as authority for the proposition that when a tax is imposed upon a transaction made before the taxing statute was enacted and at a time when the taxpayer could not have anticipated the amount or the burden of the tax, it is so arbitrary as to offend the Fifth Amendment.

The decision of the Circuit Court of Appeals for the Second Circuit in the case at bar is, therefore, in direct conflict with *Nichols* v. *Coolidge, supra.*

2. The Circuit Court of Appeals for the Second Circuit decided the case at bar on the authority of its own decision in *Commissioner* v. *Flanders,* 111 F. (2d) 117 (1940), in which a trust created in 1915 but otherwise on all fours with the trust in the case at bar was held taxable.

In the *Flanders* case the Circuit Court of Appeals held that the transfer was taxable and distinguished the *Coolidge* case on the following grounds:

> "It is urged that the *Hallock* case involved a trust created after the estate tax law was en-

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[1] See *Milliken* v. *United States,* 283 U. S. 15, 20-21 (1931); *Reinecke* v. *Smith,* 289 U. S. 172, 175 (1933); *Helvering* v. *Helmholtz,* 296 U. S. 93, 97-98 (1935); *Hassett* v. *Welch,* 303 U. S. 303, 311 (1938); *Welch* v. *Henry,* 305 U. S. 134, 147 (1938); *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 43 (1939).

acted; and that to apply the statute retroactively to Trust No. 4 would be unconstitutional, as shown by *Nichols* v. *Coolidge, supra.* However, in the *Coolidge* case the settlor's death determined his life estate but did not take from him an interest in the corpus or augment the estate created in the remaindermen by the trust deed. In the case at bar, the remaindermen would have taken nothing had the settlor survived the terms of the trust; his death was the event that destroyed his possibility of reverter and brought into being remainders of which they had full dominion" (*Commissioner* v. *Flanders, supra,* at p. 121).

This statement in regard to the *Coolidge* case is erroneous on both the grounds which are relied on to distinguish it from the *Flanders* case.

(a) Mrs. Coolidge's death deprived her of a possibility of reverter in the corpus of the trust. The remainder interest of her sons was subject to divestment by their death during the trust term. If a son died during his parents' lifetime, the persons entitled to receive his share were "those who would be entitled to take his intestate property under the statute of distribution in effect at the time of the death of said survivor, provided that in no case shall a surviving widow take as distributee more than one-half of said share" (*Coolidge* v. *Nichols, supra,* at p. 113).

It was, therefore, possible that a son, or even all the sons, might die without issue before the trust terminated. In that case the settlors, as the parents of such deceased son, would have been entitled to take the interest of any son who died unmarried and one-

half of the interest of any son who died leaving a widow.[1] The fact that Mrs. Coolidge's death terminated her possibility of reverter was urged before this Court in *Nichols* v. *Coolidge, supra,* as a reason for holding her interest in the trust taxable. The Government's brief stated that "the possibility of reverter * * * is also present in the instant case for it might well be that all the Coolidge children would die without leaving a surviving spouse before the death of the grantor" (Brief for the Appellant at p. 19).

(b) The decedent's death augmented the estate created in the remaindermen. As pointed out above, the interest of the sons was subject to divestment by death during the trust term. It was only upon the termination of the trust by the death of both Mr. and Mrs. Coolidge that the remainders vested in possession and enjoyment in their surviving sons. Had Mrs. Coolidge survived her sons they would have taken no interest in the trust property and their heirs would have been entitled to the corpus of the trust depending upon the provisions of the Massachusetts statute of distribution as the same might exist on the date when the trust terminated. As long as either Mr. or Mrs. Coolidge lived it was impossible to determine who would be entitled to take the corpus of the trust in absolute ownership. Mrs. Coolidge's death eliminated a condition precedent to the vesting of the remainders in her sons and to that extent augmented their interests.

The decision of the Circuit Court of Appeals for

[1] General Laws of Massachusetts (1921), Ch. 190, Secs. 2, 3.

the Second Circuit in the *Flanders* case is therefore in direct conflict with *Nichols* v. *Coolidge, supra.*

Conclusion

It is respectfully submitted that the within petition for a writ of certiorari should be granted.

UNITED STATES TRUST COMPANY OF NEW YORK,
HARRIET BARNES PRATT,
Executors, Estate of Harold I. Pratt, Deceased,
Petitioners,
By ROLAND L. REDMOND,
Counsel for the Petitioners.

ROLAND L. REDMOND,
BEN R. CLARK,
Of Counsel.

2 Wall Street, New York 5, N. Y.
September 20, 1946.

Appendix.

Constitution of The United States:

Fifth Amendment.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code of 1939, 53 Stat. 1:

Section 811. *Gross Estate.* The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) Decedent's Interest. To the extent of the interest therein of the decedent at the time of his death;

* * * *

(c) Transfers in Contemplation of, or Taking Effect at Death.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a

transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *